COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2015-SC-000711-D
(2014-CA-001782)

PADUCAH INDEPENDENT SCHOOL DISTRICT — APPELLANT

v.

McCracken Circuit Court
2011-CI-00316

PUTNAM & SONS, LLC — APPELLEE

REPLY BRIEF FOR APPELLANT, PADUCAH INDEPENDENT SCHOOL DISTRICT

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CERTIFICATE OF SERVICE

I hereby certify that ten (10) originals of the foregoing have been served via Federal Express upon: **Susan Stokley Clary, Clerk of the Supreme Court of Kentucky**, State Capitol, Room 209, 700 Capital Avenue, Frankfort, Kentucky 40601; and that a true and correct copy of the foregoing has been served by regular U.S. mail upon: **Samuel Givens, Jr., Clerk of the Kentucky Court of Appeals**, 300 Democrat Drive, Frankfort, Kentucky, 40601-9229; and a true and correct copy of the foregoing has been served by regular U.S. mail upon: **Hon. Craig Z. Clymer,** Circuit Court Judge, Division II, McCracken Circuit Court, P.O. Box 1455, Paducah KY 42002-1455; **Dan Biersdorf, Esq.,** Biersdorf & Associates, P.A., 150 South Fifth Street, Suite 3100, Minneapolis, MN 55402 and **Samuel J. Wright, Esq.,** P.O. Box 7766, Paducah, Kentucky 42002-7766, *Attorneys for Appellee*; this 24 day of August, 2016.

Nicholas M. Holland

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Comes Appellant, the Paducah Independent School District ("District"), by counsel, and for its Reply Brief, states as follows:

The response of Appellee, Putnam & Sons, LLC ("Putnam"), does not contain anything that justifies the Court of Appeals' inappropriate rejection of the Circuit Court's Findings of Facts and Conclusions of Law in this case. Context determines the standard to be used by a reviewing court. In this case, the Court must decide if there was sufficient evidence to sustain the trial court's findings that the land taken should be evaluated by itself and if there was sufficient evidence to sustain the trial judge's award of $115,000.00. Putnam posits in its Response, as it did to the fact finder, that it has the better argument. It is too late for that. Putnam's evidence at trial was not sufficient to convince the trial court. The only question now is whether there was substantial evidence for the trial court to come to its conclusions. As discussed below, it is clear that there was.

ARGUMENT

I. There Was Substantial Evidence to Support that the Tracts Were Not Unified.

There was more than sufficient evidence in this case to determine that the properties at issue were not unified.[1] Putnam, citing to the opinion of the Court of Appeals, argues that the District altogether failed to rebut its expert testimony regarding whether or not the three separate parcels were unified. As a result, Putnam's argument goes, the Circuit Court essentially had to adopt wholesale Putnam's expert's opinion that the highest and best use was as a large-scale warehousing operation utilizing the

[1] As it did in its initial brief, the District will refer to the taken property as the "Subject Property" and will refer to the improved, 8.3 acre warehouse property as the "Warehouse Tract."

properties in a unified manner. Of course, as the District already showed in its initial brief, that is plainly not the case.

First, Putnam (and the Court of Appeals to some extent), focus on the wrong question when examining the Circuit Court's decision. The Court of Appeals and this Court are tasked with examining if the decision of the trial court was "clearly erroneous." As this Court has noted:

> A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence [that], when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.

Gosney v. Glenn, 163 S.W.3d 894, 898 (Ky. App. 2005). It is plainly *not* the task of the appeals court to determine whether the trial court might have come out another way if it had weighed the evidence differently. *See e.g.*, *Clay v. National City Bank of Kentucky*, 2012 WL 5038336 *2 (Ky. App. 2012) (noting that the appeals court will not reverse just because there was "substantial evidence that supported" a different outcome, but that "our actual concern as a reviewing court is whether the court's findings were 'clearly erroneous'").[2] Determinations of credibility and the weight to be given to conflicting evidence are plainly within the discretion of the trial court and judgments should not be disturbed simply because a higher court determines that a different analysis of the factors might have resulted in a different outcome. *See id.* at *3 (finding that the trial court "perhaps could" have found in favor of the non-prevailing party but that such did not constitute clear error). Yet that is exactly what was done in this case and is advocated by Putnam. Because the trial court's decision was not clearly erroneous, it should be affirmed.

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[2] Pursuant to CR 76.28, a copy of this opinion is attached hereto.

Second, as the District showed in its initial brief, in analyzing the unity of the parcels, the Circuit Court analyzed the factors that were identified as relevant by the Court of Appeals, including (i) the current use of the property, (ii) whether the properties had ever been used together, and (iii) the highest and best use of the property. There is no question that it considered the current use, but it was not to the exclusion of the others. As to the second factor, the trial court noted in its order that the properties had once been used together, but such had not been done for more than thirty years.[3] (RA at 244). As to the third factor, the trial court considered the highest and best use of the Subject Property. It noted (i) the long history of the Warehouse Tract being used without support from the Subject Property,[4] (ii) the fact that the Subject Property was not needed for the warehouse tract to continue being utilized as a warehousing facility, and (iii) testimony from the current tenant of the Warehouse tract, which included testimony regarding the long-term, extreme, and uninterrupted deterioration of the warehouse without any apparent effort by the absentee owner to make any repairs,[5] a sure sign that Putnam had no near-future intent to use the Warehouse Tract or the Subject Property for large-scale warehousing. There was also evidence in the record, as noted by the Circuit Court, of the failure of the

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[3] To the extent that Putnam relies upon purported "Google maps" photos showing tractor-trailers on the Subject Property to prove otherwise, the District notes that those photos do not appear to be in evidence and completely lack any context as to when, why, or how those tractor-trailers came to rest on the Subject Property. Indeed, such evidence could just as easily support the opposite conclusion that the Subject Property was used separate and apart from the other properties.

[4] Sirk Deposition at 22-23 (hereinafter "Sirk Depo."). Putnam's argument that the thirty year history of the property merely reflects current use of the property defies comprehension. The *current* use of the property is just that. The fact that the historical use of the property has been identical to the current use does not make it any less probative of the question whether a unified use is likely. In fact, the thirty year precedent of the Subject Property not being used in support of activities on the Warehouse Tract strongly suggests that a unified use in the near future was improbable.

[5] Trial Transcript at 23-24.

current owner to sell the properties over a period of years[6] and the lack of demand for warehouse space in the relevant market.[7] (RA at 243).

The Court of Appeals and Putnam suggest that the trial court focused on only one factor or was required to balance these factors equally in its analysis, but this is not the case. Both Putnam and the Court of Appeals seem to ignore the Court's consideration of these multiple factors because they are not recited in a certain order or because the trial court did not use some heretofore unknown "magic words" in writing its opinion. But this is an insistence on form over substance that, if endorsed, will lead to abuse of the appeals process in eminent domain cases and beyond. It is clear from the substance of the trial court's opinion that it was unconvinced by Putnam's expert's argument that the highest and best use of the property was that by Putnam. When read as intended, it is clear that in the court's estimation, because of a multitude of factors shown by substantial evidence, consideration of the tracts as a unified whole was unjustified and did not warrant further consideration. As such, the trial court's decision should be affirmed.

Finally, there is no reason or justification for this Court to make new law by adopting the list of factors set forth in the Florida case *Div. of Admin., State Dep't of Transp. v. Jirik*, 471 So. 2d 549 (Fla. Dist Ct. App. 1985). That case has no precedential value and is merely a red herring. The trial court carefully examined the relevant factors and evidence in this case, relied on substantial evidence in rendering its judgment, and therefore should be upheld.

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6 Sirk Depo. at 22:24-23:2.

7 Sirk Depo. at 22:21-23:4; 26:20-24; 33:4-13.

II. There Is No Requirement That the District Rebut All of Putnam's Expert's Opinions Individually.

The Court of Appeals' statement that "Putnam offered proof from Spence that the value of its properties as a whole was permanently diminished by the taking" and that such evidence therefore requires rebuttal by the District is plainly wrong and lacks precedential support. Putnam's argument, endorsed by the Court of Appeals, is essentially circular. It first assumes that a unified use is also the highest and best use. It then demonstrates that taking away a piece of the property eliminates that presumed highest and best use. It then concludes that because that unified use is no longer possible and impairs the value of the property, it therefore must be the highest and best use.

Of course, unlike the trial court's decision, such an analysis skips the essential step of examining a proposed highest and best use and determining whether there is a "reasonable expectation that [the property] will be so used" as required under Kentucky law. *Big Rivers Electric Corporation v. Barnes*, 147 S.W.3d 753, 757 (Ky. 2004). As discussed in the District's initial brief, "there must be an expectation or probability in the near future" that a property can or would be put to such a use in order for such a use to be considered the highest and best use. *Id.* In this case, the District's expert rejected the notion that the highest and best use of the properties was as a unified whole, relying upon his extensive knowledge of the local market, local demand for warehousing space, and his knowledge of the historical use of the property. (Sirk Deposition at 20-26). The Circuit Court agreed with Sirk in this regard.

The Court of Appeals was wrong, therefore, to reject Sirk's testimony because he evaluated the property only as a stand-alone property. Sirk had already taken the initial step of determining that a unified use was not the highest and best use. As shown above,

there was ample evidence in the record that the highest and best use of the properties was not as a unified whole. Thus, a valuation of the various properties in that way was unwarranted. No Kentucky case holds that a valuation expert must evaluate property for all of the multitudes of potential uses that a competing valuation witness believes are relevant. If the Court of Appeals' position were correct, a valuation expert would have to anticipate every possible use another expert might evaluate and undertake his own evaluation of those uses, regardless of likelihood. In the typical case under such a rule, the experts in this case would have to evaluate all potential uses, including warehousing, manufacturing, farming, low and high density residential, retail, golf courses, and on and on. The Court should reject this view and uphold the Circuit Court's determination that a unified use was not reasonably likely, thus obviating the need for rebuttal testimony on a before-and-after analysis considering the properties as a unified whole.

There is no duty in Kentucky for a party to rebut every opinion set forth by an opposing expert. Here, the District clearly rebutted Putman's expert's en masse when it showed that Putnam's use was not the highest and best. Any further rebuttal was moot. Because the District had no duty to specifically and individually rebut other expert evidence set forth by Putnam regarding the unified use of the property, the trial court's decision should be affirmed.

III. The Court Relied On Competent Evidence to Establish Its Valuation.

The trial court was also acting within its reasonable discretion in relying on the competent and substantial evidence that it used to render its decision. Three criticisms have been leveled at the Circuit Court's reliance on the 2002 deed of these properties from the Putnam partnership to Putnam. Specifically, Putnam and the Court of Appeals

fault the Circuit Court because: (i) the transaction occurred in 2002, (ii) the transaction was between related parties, and (iii) the Court, in their view, used a before-and-after analysis to establish the value. These criticisms are invalid and do not show that the Circuit Court committed clear error in this case or misapplied the law.

First, the fact that the transaction occurred in 2002 does not make the deed "incompetent evidence," as stated by Putnam. Kentucky law is crystal clear that the age of a transaction goes to the weight to be given to a particular transaction, but it does not disqualify the transaction from consideration altogether. *See Usher & Gardner, Inc. v. Mayfield Indep. Bd. of Ed.*, 461 S.W.2d 560 (Ky. 1970). Moreover, the probative value of this particular transaction is greater because this was a transaction involving the *very same property* that was to be valued in this case, rather than a valuation of a different property with different characteristics to be weighed against other comparable sales. As a result, it was correct for the Circuit Court to give considerable weight to the consideration set forth in the deed.

Second, the fact that the 2002 deed was between related parties does not affect the probative value of the consideration statement in that deed *in any way*, contrary to Putnam's arguments. To suggest otherwise, as Putnam does, misstates Kentucky law regarding the consideration statement set forth in Kentucky deeds. Where, as here, no or nominal consideration has changed hands for the transfer of the property, the parties are required to set forth the "estimated fair cash value" of the property in the consideration statement. KRS 382.135(1)(d)(2). The term "fair cash value" is synonymous with "fair market value" and the sworn consideration statement in such cases should not reflect any discount because of the relationship of the parties, but instead should be an estimate of

the value of the property in an arms-length transaction. This is because the consideration statement is used to collect state and county transfer tax pursuant to KRS 142.050 and is also frequently used by local property valuation administrators to set the tax values of property.[8] As a result, the fact that the 2002 deed was between related parties does not affect the probative value of the deed at all.

Third, the fact that the Circuit Court used the consideration statement in the 2002 deed to set the initial value of the three properties in performing its valuation calculation does not show that the court used a before-and-after analysis considering the properties as a unified whole. Instead, because the deed was for all three properties, the trial court assumed that the consideration statement reflected the sum of the separate value of the properties. This is a perfectly reasonable assumption, as a deed for three geographically separate properties likely also would have provided only one consideration statement for the three properties. Thus, when the Circuit Court subtracted the value received for the rest of the property conveyed on that deed, it was not undertaking a "before-and-after" analysis, but was simply subtracting the value of the other two properties on the deed from the cumulative value assigned to all three properties as sworn to by their owner.

The trial court relied on competent, relevant, and substantial evidence in accordance with Kentucky law to render its decision. Such decision was within the court's sound discretion and was not clear error or a misapplication of law. Therefore, the trial court's decision should be affirmed.

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[8] Of course, Putnam was perfectly willing to accept a lower value for these properties when it stood to benefit from a lower valuation (i.e., when it was required to pay taxes based on that valuation).

IV. The Court's Valuation Was Within the Range of the Competent Evidence and Should Be Upheld.

As the District showed in its brief, the Circuit Court's decision was within the range of the evidence and therefore should be upheld unless "palpably inadequate or excessive." The Court of Appeals did not make any determination that the award shocked the conscience, but instead substituted its own judgment for that of the fact finder. Thereby, the Court of Appeals erred. The Circuit Court's valuation was based on a value assigned by the owner of the property in a sworn statement, was more than double the tax assessed value of the Subject Property, and was nearly double the value placed on the Subject Property by the District's expert. The valuation of Putnam's expert, as the Circuit Court found, lacked credibility and the Circuit Court was well within its discretion to give it little weight.

CONCLUSION

Because the Circuit Court's decision was based on substantial, competent evidence, it should have been upheld. This Court should reverse the decision of the Court of Appeals and affirm the Circuit Court's decision.

Respectfully submitted,

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